Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules to	)	PR Docket No. 92-79
Eliminate Separate Licensing	)	
of End Users of Specialized	)	
Mobile Radio Systems	)	

COMMENTS OF
MCCAW CELLULAR COMMUNICATIONS, INC.

Mark R. Hamilton
Executive Vice President--
External Affairs

Scott K. Morris
Vice President -- Law

MCCAW CELLULAR COMMUNICATIONS
COMPANIES, INC.
5400 Carillon Point
Kirkland, Washington 98033

(206) 827-4500

R. Michael Senkowski
Jeffrey S. Linder
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006
(202) 429-7000

Its Attorneys

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MCCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys, respectfully submits its comments regarding the above-captioned Notice of Proposed Rulemaking ("Notice").[1] As discussed below, the proposal to eliminate the separate licensing requirement for end users of Specialized Mobile Radio Systems ("SMRS") raises, once again, the legal issue of whether SMR operators should continue to be classified as private carriers under § 332 of the Communications Act. More fundamentally, it underscores the need for a prompt, comprehensive reassessment of the regulatory and marketplace relationships between private and common carriers.

I. SUMMARY

In 1982, the Congress sought to draw a definitional bright line between regulated common carrier services and unregulated private radio services. Since that time, SMRs have enjoyed increasing freedom to pursue marketplace

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[1] FCC 92=172 (released May 5, 1992).

opportunities. For example, in the intervening years, preexisting SMR eligibility limitations have been removed; statutory interconnection prohibitions interpreted narrowly; and, cellular-type frequency reuse systems endorsed.

The proposal to eliminate SMR end user licensing would remove the last vestige of any functional differences between regulated cellular common carriers and unregulated SMRs. There can be no serious doubt that implementation of this proposed action would effectively allow SMRs to function similarly to cellular carriers. The Commission ultimately must face the legal issue of whether SMRs - so redefined and so restructured - continue to fall within the meaning of private land mobile radio services as embodied in Section 332 of the Communications Act.

Viewed from a slightly different perspective, the proposal calls into question the justification of maintaining two separate regulatory schemes for private carriers and common carriers that offer the same services. It is difficult to rationalize for example why one provider may operate free from state regulation and without any restrictions on foreign ownership, customer selection, and pricing policies when another operator - whose spectrum has been classified as a common carrier frequency - must contend with these constraints. Accordingly, the Commission should promptly initiate an inquiry, in this proceeding or separately, to eliminate regulatory distinctions between

private and common carriers providing functionally equivalent services.

II. ELIMINATION OF END-USER LICENSING WOULD COMPLETE THE TRANSFORMATION OF SMR SERVICE INTO THE FUNCTIONAL EQUIVALENT OF COMMON CARRIER CELLULAR SERVICE.

Over the past several years, the SMR service has undergone a remarkable transformation. When Congress enacted Section 332 of the Communications Act in 1982, SMR operators provided dispatch services to commercial and local government users who were eligible under one of the private radio categories, such as local government, police, forestry, power, petroleum, special industrial, business, and radio locations.[2] SMRs also were subject to strict interconnection limitations.[3]

In contrast, cellular service offered two-way messaging services. Cellular providers could serve any user and faced no interconnection limits. They were, however, barred from providing dispatch services on common carrier frequencies, and this prohibition remains in effect.[4]

The distinctions between SMRs and cellular carriers soon began to blur. In 1985, the D.C. Circuit approved the Commission's interpretation of the interconnection

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[2] See H.R. Rep. No. 97-765, 97th Cong., 2d. Sess. 54 (1982).

[3] See 47 U.S.C. § 332(c)(1).

[4] Id. § 332(c)(2).

restriction as barring only the resale of telephone service for profit.[5] As a practical matter, this interpretation ensures that a private carrier will not violate the restriction as long as bills to its subscribers do not expressly mark up telephone charges.

In 1988, the Commission dramatically expanded the potential customers of SMR service to include individuals and federal government users.[6] This fundamental rule change allowed SMR operators for the first time to compete directly against cellular service providers. Indeed, the Commission acknowledged that expanding eligibility for SMR service would give SMR operators an advantage over cellular carriers, which, "by virtue of their common carrier status, may not be able or permitted to meet specialized requirements of certain customers."[7]

In 1990, Fleet Call sought rule waivers in order to establish "enhanced" SMR service ("ESMR") in six large cities nationwide. Fleet Call characterized its plans as evolutionary.[8] Nonetheless, ESMR actually changed a high-

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[5] Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985).

[6] See Amendment of Part 90, Subparts M and S of the Commission's Rules, 64 R.R.2d 1042 (1988).

[7] Id. at 1048-49.

[8] Fleet Call, Request for Authority to Assign SMR Licenses and Waiver of Certain Private Radio Service Rules, filed April 5, 1990, at i.

power, dispatch-oriented service with nonexclusive frequency assignments and mileage-based interference protection into a low-power, frequency reuse, message-oriented service with exclusive frequency assignments and service area-based interference protection.

The Commission granted Fleet Call the relief it needed in 1991.[9] In response to concerns that the proposed ESMR service would be functionally equivalent to common carrier cellular service, the Commission stated that "the services that Fleet Call will provide ... are not functionally different from any service that it currently provides through its existing stations."[10]

This conclusion apparently was based on Fleet Call's representation that "ESMR differs both functionally and technically from cellular technology in several critical ways."[11] As support for this proposition, Fleet Call claimed that "ESMR is not a nationwide interconnected system with 'roaming' ability," and that "ESMR, like other SMR systems, will serve only licensed, eligible end users."[12] Indeed,

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[9] Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991), recon. denied, 6 FCC Rcd 6989 (1991).

[10] Id. at ¶ 29.

[11] Reply Comments of Fleet Call at 11.

[12] Id.

Fleet Call placed particular weight on end user licensing as a distinction from cellular service:

> To the extent that ESMR succeeds in attracting customers away from cellular systems, it will not be because they see ESMR as a functional equivalent to cellular .... They would not ... endure the burden of end user licensing, which is not part of cellular telephone service ...."[13]

These asserted distinctions between SMR and cellular service -- lack of nationwide roaming and end-user licensing -- may now be eliminated in two pending proceedings. First, Fleet Call has filed a rulemaking petition asking the Commission to establish and auction off "innovator blocks" of SMR spectrum, which would form the foundation for a national ESMR wireless infrastructure.[14]

Second, the instant proceeding proposes to eliminate separate licensing of SMR end users. This proposal, if adopted, would complete the transformation of SMRS from a private dispatch service available only to authorized users

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[13] Fleet Call Waiver Request at 36.

[14] According to Fleet Call, this infrastructure would enable SMRs "to provide virtually 'universal' coverage to support portable mobile use by customers who find themselves operating over increasingly wide regional areas" -- that is, to duplicate cellular roaming capabilities.

McCaw will file comments explaining in detail its position regarding Fleet Call's rulemaking request. It is important to note here, however, that grant of that petition is not necessary in order to enable SMR roaming. As the Notice in the instant proceeding recognizes, "[m]any [SMR] base station licensees have roaming arrangements with other system licensees, thus giving end users wide-area coverage." Notice at 2 n.12.

to a common carrier-equivalent, fully interconnected two-way communications service available to all comers.

III. THE ELIMINATION OF END-USER LICENSING WOULD CAST SERIOUS DOUBTS ON ESMRS' STATUS UNDER SECTION 332 OF THE COMMUNICATIONS ACT.

The Notice suggests that the elimination of end-user licensing "does not change the private carrier status of Specialized Mobile Radio licensees."[15] McCaw respectfully submits that this conclusion must be carefully re-examined.

Section 332 of the Communications Act establishes a statutory standard for differentiating private and common carrier providers of land mobile services.[16] The legislative history of this provision offers guidance about the intended distinctions between these entities:

> [T]he basic distinction set out in this legislation is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone services or facilities or a common carrier as part to he

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[15] Notice at 2 n.11.

[16] 47 U.S.C. § 332. This section states that private land mobile service shall include:

> service provided by specialized mobile radio ... regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users ... shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly authorized carrier.

entity's service offering. If so, the entity is deemed to be a common carrier.[17]

Other Congressional pronouncements confirm that the function of a particular service determines whether it satisfies the statutory standard. For example, in explaining the need for the interconnection restriction, the House Report emphasized that Congress sought to "assure that frequencies allocated essentially for purposes of providing dispatch services are not significantly used to provide common carrier message service."[18] In addition, the sponsors of the underlying Senate bill emphasized that the definition of private land mobile service "does not include common carrier operations like the new cellular systems."[19]

Given the almost complete transfiguration of SMR service into a cellular-equivalent, there is a serious question whether the functional test set forth by Congress could be satisfied if end user licensing is eliminated. Other than

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[17] H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 55 (1982) ("House Report").

[18] Id. at 56.

[19] Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inouye upon introduction of S.929, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981) (emphasis added). Similarly, the House Report stated that the definition of private land mobile service "encompasses the myriad of radio systems utilized by these governmental, commercial, industrial and transportation licensees which range from small relatively uncomplicated two-way dispatch systems, to complex ones involving multiple transmitters to cover wide areas." House Report at 54.

the fact that ESMRs operate on frequencies that the Commission has designated as private, the two services would be functionally identical.[20] Thus, classifying wide-area ESMR as "private" would be a triumph of form over substance, and would ascribe to Congress an irrational intent: that functionally identical services be regulated differently solely because the Commission chooses to characterize one category of providers as private. Such a conclusion is inherently untenable.

IV. THE COMMISSION SHOULD EXPAND THIS PROCEEDING TO RATIONALIZE ITS REGULATION OF PRIVATE AND COMMON CARRIERS PROVIDING FUNCTIONALLY EQUIVALENT SERVICES.

In its comments on Fleet Call's innovator block petition, McCaw will review the considerable regulatory disparities between ESMRs and cellular carriers and explain how these disparities preclude full and fair competition in the mobile services marketplace.[21] It will also urge the Commission to promote competition with respect to SMR and dispatch services by taking prompt, favorable action on Telocator's Flexible Cellular petition.

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[20] Of course, cellular carriers would still be prohibited from providing dispatch services on common carrier frequencies. This entry barrier, however, cannot provide a logical basis for distinguishing ESMRs and Part 22 licensees.

[21] These disparities include the fact the cellular carriers are subject to state regulation, must allow resale, must provide service on a non-discriminatory basis, must provide service upon reasonable request, and must allow interconnection by competing carriers.

The instant proceeding underscores the need for such action. Elimination of the end user licensing requirement would, as Fleet Call concedes, make ESMR services more attractive to existing and potential cellular subscribers. It would enable SMRs to offer customized combinations of two-way message and dispatch services to any customer that could be served by a cellular carrier, while insulating the SMR operator from state utility regulation, from common carrier obligations such as the duty to provide service on a nondiscriminatory basis, and from the limitations on foreign ownership.

In light of these inequities, the Commission should comprehensively reassess its licensing and regulatory goals for mobile services. The current pattern of accelerated relief for private carriers and inaction on relief for common carriers clearly should not be allowed to persist." Accordingly, McCaw urges the Commission to expand this proceeding - or institute a new proceeding - in order to more rationally define the regulatory and marketplace relationships between private and common carrier mobile service providers.

V. CONCLUSION

For the foregoing reasons, the Commission should carefully consider how the elimination of end user licensing, combined with recent and proposed changes in the SMR

industry, would affect the legal status of ESMRs under Section 332 of the Communications Act. In addition, the Commission should remove barriers to competition by cellular carriers in the SMR and dispatch marketplace and reassess its licensing and regulatory goals for the mobile services.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.

By: R. Michael Senkowski

R. Michael Senkowski
Jeffrey S. Linder
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006
(202) 429-7000

Mark R. Hamilton
Executive Vice President--
External Affairs

Scott K. Morris
Vice President -- Law
MCCAW CELLULAR COMMUNICATIONS COMPANIES, INC.
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Kirkland, Washington 98033

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